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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

Abu-Ali Abdur'Rahman,

Petitioner,

v.

Ricky Bell, Warden,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Sixth Circuit

BRIEF FOR FORMER PROSECUTORS JAMES F. NEAL, W. THOMAS DILLARD, QUENTON I. WHITE, JUDGE JOHN J. HESTLE, RALPH E. HARWELL, AND CHARLES FELS, *AMICI CURIAE*, IN SUPPORT OF PETITIONER

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Former prosecutors James F. Neal, W. Thomas Dillard, Quenton I. White, Judge John J. Hestle, Ralph E. Harwell, and Charles Fels file this Amici Curiae brief in support of Petitioner pursuant to Supreme Court Rule 37.3(a). The parties have consented to the filing of this brief.*

INTEREST OF AMICI CURIAE

James F. Neal, W. Thomas Dillard, Quenton I. White, Judge John J. Hestle, Ralph E. Harwell, and Charles Fels are attorneys who formerly served as state or federal prosecutors in the State of Tennessee. James F. Neal served as a Special Assistant to the Attorney General of the United States, 1961-64; United States Attorney for the Middle District of Tennessee, 1964-66; Chief Trial Counsel, Watergate Special Prosecution Force, 1973-74; Chief Counsel, Senate Select Committee to Study Undercover Operations of the Department of Justice, 1982; and currently is a partner at Neal & Harwell. W. Thomas Dillard served as an Assistant United States Attorney for the Eastern District of Tennessee from 1967–76; First United States Attorney for the Eastern District of Tennessee, 1978–83; United States Attorney for the Northern District of Florida, 1983–86; and United States Attorney for the Eastern District of Tennessee, August to December of 1991. Quenton I. White served as United States Attorney for the Middle District of Tennessee, 2000-01. Judge John J. Hestle served as an Assistant District Attorney General for the Nineteenth Judicial District of Tennessee from 1970–74; and District Attorney General for the nineteenth Judicial District of Tennessee, 1974–82. Ralph E. Harwell served as an Assistant District Attorney General for the Sixth

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* Letters of consent have been filed with the Clerk of the Court. No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than Amici Curiae and their counsel made a monetary contribution to the preparation or submission of the brief.

Judicial District of Tennessee from 1969–76. Charles Fels served as an Assistant United States Attorney for the Middle District of Tennessee from 1974–77; Assistant District Attorney General for the Sixth Judicial District of Tennessee (Knox Co.), 1979–82; and Assistant United States Attorney for the Eastern District of Tennessee from 1982–84.

As a result of their former positions, Amici have a shared interest in the maintenance of high ethical standards in the prosecution of Tennessee criminal cases.

Amici Curiae submit that the habeas corpus petition in this case raises serious issues of prosecutorial misconduct that should be reviewed by the federal courts. The Assistant District Attorney General assigned to the case withheld important evidence from the defense and misled the court, the jury and defense counsel about relevant facts.

As former law enforcement officials, we each possess a personal appreciation for the unique role of the prosecutor in the American criminal justice system. Former Tennessee Attorney General Michael Cody has written: "We want to make sure that the perpetrators of heinous crimes are caught, tried and punished. But we must also ensure that we have the right person and that the perpetrators are convicted and punished within the guidelines of our Constitution." W.J. Michael Cody, The Death Penalty in America: Its Fairness and Morality, 32 U. Mem. L. Rev. 919, 920 (2001).

Prosecutors bear an ethical duty to search for the truth and present only the truth to the jury. The government's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). See also State v. Spurlock, 874 S.W. 2d 602, 611 (Tenn. Crim. App. 1993)(quoting Berger).

All of us handled serious felonies and several of us handled capital matters when we served as prosecutors.

Charles Fels, Judge Hestle, and Ralph E. Harwell each prosecuted cases in which the death penalty was sought. We carried out that responsibility with a heightened sense of our ethical obligations. It is an awesome task to build a case for the State to take a man's life and to argue to a jury that it should return a death sentence. While the consequence of prosecutorial misconduct is serious in any criminal prosecution, it is harrowing in a capital case.

Further, as members of the Tennessee Bar, we are familiar with the customs and practices of our state's criminal courts. Among us, we have personally handled or supervised thousands of criminal prosecutions in the federal courts and in the state courts of Tennessee. This case is atypical. The prosecution of Petitioner fell far short of the standards of our state court system and, indeed, below what we understand the federal constitutional minimum standards to be. In our view, the record below taints all members of the Tennessee Bar and especially those of us who had the privilege of representing the State of Tennessee or the United States in the courts of our State and in the federal courts.

This case presents to the Court a complex procedural question involving the interaction of certain federal statutes and court rules. Amici Curiae do not purport to address that question in this brief. Instead, we inform the Court of our view that there are substantial constitutional issues underlying the procedural issue addressed by the parties. Petitioner's prosecutorial misconduct claims have never been fully addressed by the federal courts. Amici urge the Court to resolve the procedural issues in a manner that permits review of the Petitioner's serious claims of prosecutorial misconduct.

STATEMENT OF THE CASE

In state and federal habeas petitions, Petitioner presented claims and evidence of prosecutorial misconduct in

his capital trial. Because of procedural rulings below, no federal court has addressed these constitutional claims in their totality. If this Court agrees with Petitioner that the District Court should have granted his Rule 60(b) motion, Petitioner will finally have an opportunity for meaningful federal review of prosecutorial misconduct that denied him a fair trial and that undermines confidence in his death sentence.

The prosecutorial misconduct in this case involved the withholding and misrepresentation of evidence on key issues, including: the identity of the person who did the stabbing; the circumstances of a prior homicide used as an aggravating circumstance in support of the death penalty; and Petitioner's mental condition, a condition that should have been presented to the jury in mitigation of the death sentence and that would have shed light on Petitioner's bizarre inculpatory testimony in the penalty phase of the trial.

The district court held that it could not address most of Petitioner's prosecutorial misconduct claims, because they had not been raised in a petition for discretionary review to the Tennessee Supreme Court. Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1080 (M.D.Tenn. 1998). The district court addressed two issues it found to have been exhausted: the prosecutor's failure to provide trial counsel the lab report stating that no blood was found on the coat or other clothing Petitioner had worn on the night of the crime, and the prosecutor's failure to provide defense counsel a transcript of Petitioner's 1972 trial for murder. 999 F. Supp. at 1083. That transcript would have made clear to counsel that the earlier event did not involve gangs and drugs, as the prosecutor asserted, but was the result of homosexual assaults on Petitioner in prison. In addition, the transcript included testimony from two psychiatrists, including one for the government, that Petitioner was not able to control his behavior, information that would have been crucial in Petitioner's sentencing hearing.

Of the two issues it addressed, the district court found that the former was not misconduct because the prosecutor had supplied the lab report to Petitioner's prior counsel, and the latter failure to disclose evidence, although unlawful under Brady, did not, "standing alone," warrant habeas relief. 999 F. Supp. at 1090. Because the district court did not consider the extensive remaining misconduct in the case, it did not address how these two matters related to Petitionier's claim that the prosecutor undertook a concerted effort to withhold and distort evidence he knew would make it difficult to secure a death sentence. Nor did the court consider the aggregate effect of the misconduct on Petitioner's sentencing-phase defense and on the jury's search for the truth. No federal court has addressed the full range of the prosecutor's misconduct.[1]

SUMMARY OF ARGUMENT

Early in his investigation, the prosecutor recognized flaws in his case for a death sentence against Petitioner. The

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[1] Both the Tennessee Supreme Court and the district court noted other misconduct by the prosecutor. The Tennessee Supreme Court found that the prosecutor's conduct in getting improper evidence before the jury "bordered on deception." State v. Jones, 789 S.W.2d 545, 552 (Tenn. 1990). The district court found that the prosecutor misrepresented to defense counsel the circumstances of Petitioner's prior conviction. Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1099-1100 (M.D. Tenn. 1998)("[t]he prison murder was not about drugs and gangs as represented by the prosecution to defense counsel"). In addition, as the district court recognized, the habeas petition raised numerous other allegations of prosecutorial misconduct, none of which was addressed by the district court, because it deemed them not to have been exhausted. 999 F. Supp. at 1082 n. 8. See also Rule 60(b) Motion at pp. 7-8.

scientific evidence strongly suggested that Petitioner was not the stabber, raising doubts the prosecutor knew would preclude capital punishment. The evidence at the habeas corpus hearing indicates that the prosecutor masked the weaknesses in his case by suppressing key documents and presenting misleading testimony from an accomplice.

The prosecutor relied heavily on a prior homicide conviction in his request for the death penalty. In order to prevent the defendant from explaining mitigating facts concerning this prior offense, the prosecutor misrepresented those facts to defense counsel and falsely represented that an FBI agent would testify to the prosecutor's version of the events if the defense put those circumstances at issue.

The prosecutor was aware that Petitioner had a significant mental health history and had engaged in psychotic behavior that might mitigate the death sentence and that might have explained his bizarre testimony at the sentencing hearing. The prosecutor suppressed police reports documenting Petitioner's psychotic symptoms and provided false information concerning Petitioner's mental history to the state agency charged by the court with evaluating Petitioner's mental state.

The evidence presented at the habeas corpus hearing indicates that the prosecutor's conduct was a gross deviation from the standards of the legal profession. The prosecutor's duty is to seek justice, not merely to convict. American Bar Association, Standards for Criminal Justice: The Prosecution Function, 3-12(c) (3d ed. 1993). The deception engaged in by the prosecutor in this case is incompatible with that duty.

The prosecutor's conduct also deprived Petitioner of due process. The prosecutor engaged in the knowing suppression of favorable evidence, Brady v. Maryland, 373

U.S. 83 (1963), and the knowing misrepresentation of evidence. Miller v. Pate, 386 U.S. 1 (1967).

The record of this case indicates that the prosecutor engaged in a pattern of deception that deprived Petitioner, and ultimately the jury, of information that would have fundamentally altered the calculus in the sentencing phase of Petitioner's trial. No valid interest will be served by allowing Petitioner to be executed without federal review of the full course of prosecutorial misconduct that occurred in this case.

ARGUMENT

I. The Prosecutor Withheld and Misrepresented Evidence to Convince the Trial Jury that Petitioner, Rather than an Accomplice, Performed the Stabbing.

Evidence that Petitioner was the actual stabber was crucial to the jury's willingness to impose the death penalty. The prosecutor testified in the district court that he knew that Nashville jurors are "tougher to get death sentences from" than other Tennessee jurors. H.T. 905. They will not impose death verdicts unless they can be "sure beyond a shadow of a doubt that the person the state is seeking the death penalty on was in actuality responsible for the murder." Id. The defendant must be the "shooter or the sticker." H.T. 907. In his sentencing-phase summation, the prosecutor's co-counsel stated that "the main issue in this case was who was the sticker, who wielded that knife." T.T. 1944.

The prosecutor understood that, if all of the evidence were known, it would be difficult to persuade the jury that Petitioner was "the sticker." In a March 24, 1987 internal memorandum, the prosecutor listed several "Weaknesses in the Case" for "seek[ing] the death penalty." H. Ex. 42. First was the difficulty of proving that Petitioner himself was the stabber. The surviving victim, Norma Norman, was

blindfolded and did not see who stabbed the deceased or herself. H. Ex. 42. Ms. Norman had described Petitioner as wearing a full-length black "gangster coat." T.T. at 1343. Police had seized the "long black coat" at Petitioner's home shortly after the incident.[2] At trial, the prosecutor displayed the coat seized from Petitioner's home as the "gangster coat" worn during the murder. T.T. at 1673. There was, however, no blood found on any of the clothing seized from Petitioner, including the coat that witnesses said Petitioner wore during the incident. See T.T. at 277, 292, 322, 331-333, 341.

The prosecutor understood the significance of the lack of blood on the long black coat. As he explained to a supervisor, "[p]hotographs of the decedent's house show blood spattering all over the kitchen." H. Ex. 42. Likewise, the police reports and the autopsy report confirmed that the stabbing had produced a copious quantity of blood. H. Ex. 1-4; H. Ex. 14. The lead detective observed the "large amount of blood splattering on items near the victim [and] on the walls, bar, and divider," H. Ex. 3, and concluded, as he explained in the habeas proceedings, that the blood splatter would have occurred following each blow to the heart. H. Ex. 110 at 42-43.[3] The prosecutor concluded in the report to his

[2] The prosecutor's file memorandum noted that it was very unlikely the coat had been cleaned or replaced with a different coat, because the police also found a shotgun under Petitioner's bed, and he surely would have disposed of the gun if he cleaned or replaced the coat. See H. Ex. 42 at 678. In any event, forensic tests would have detected traces of blood, even if the coat had been cleaned. H.T. 35-36, 59-61.

[3] Expert testimony at the district court hearing confirmed that, if Petitioner had squatted over the decedent as the prosecution contended, he would have been copiously spattered with blood. Abdur'Rahman v. Bell, 999 F. Supp. 1073, 1085 (1998) (citing T.T. at 37-39, 77).

supervisor that there were only two reasonable possibilities: "Either the defendant removes his coat before he began to stab these people . . . or if the defendant did wear this coat the entire time he obviously was not present when the stabbing occurred." H. Ex. 42.

The prosecutor had no evidence that Petitioner removed his coat. In fact, the only neutral witness who saw Petitioner during or shortly before or after the stabbing said that Petitioner had on the long black coat. In a statement to police shortly after the events, Norma Norman's daughter said that she had "peeped" out of her bedroom into the kitchen during the incident and that Petitioner, the "light skinned" man in glasses, "had on a wool coat." H. Ex. 6.

Petitioner's co-defendant, Devalle Miller, gave police a three-hour oral confession in which he admitted taking part in the assault but said that Petitioner was the stabber.[4] The prosecution also interviewed Miller for an additional thirteen hours over the course of four interviews during the week before the guilt and sentencing phases of the trial. F.T. 1034-8. Miller never said that Petitioner removed his coat and strongly implied the contrary. Yet the prosecutor relied on Miller to explain away the absence of blood from petitioner's clothing: "Miller stated that the stabbing of the deceased did not produce the blood that was spattered, but that the blood that was splattered occurred as the deceased gasped for air after the defendant had gone to the second victim and begun to stab her." H. Ex. 42 (emphasis in original). Given his own statements to his supervisor, his confirmatory testimony in post-conviction proceedings, and the conclusion his lead detective reached based on experience investigating homicide scenes, the prosecutor surely knew Miller's explanation was

[4] Miller fled Tennessee after the murder. The clothing he wore during the incident was never located or tested for blood.

inconsistent with the evidence and with his own internal memorandum. See H.T. 917; H Ex. 42; H. Ex. 110 (pp. 42-43).

The prosecutor shielded from the defense and the jury this major weakness in his case. The jury heard none of the evidence establishing that the person who did the stabbing would have been covered with blood, that Petitioner's long black coat had no traces of blood and that witnesses saw Petitioner in the long black coat and did not see him remove it.

First, the prosecutor withheld from the defense the police reports describing the "large amount of blood splattering on the items near the victim . . . on the walls, bar and divider." H. Ex. 3; H. Ex. 1, 2, and 4. The prosecutor did not turn over the lead detective's notes on the blood splatter, nor did the detective describe the blood splatter to the jury. T.T. 1583-1625. Second, the prosecutor withheld from the defense Shonta Norman's statement that Petitioner (the "light skinned" man "in glasses") "had on a wool coat" when she looked into the kitchen after hearing the decedent making a choking sound that probably was the result of the stabbing. H. Ex. 6. Third, the prosecutor withheld from trial counsel the lab report showing no blood on Petitioner's coat, pants and shoes, H. Ex. 9A; the prosecutor gave this report to Petitioner's original lawyer but did not give it to Petitioner's trial counsel, who requested discovery. [5]

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[5] The district court found no Brady violation in the prosecutor's failure to give trial counsel the lab report, because he had given it to prior counsel. 999 F. Supp. at 1089. The district court ruled that defense counsel was ineffective for failing to obtain the report. The district court did not rule on the prosecutor's purposeful distortion of the evidence concerning the identity of the stabber, of which the withholding of the lab report was only one aspect.

The prosecutor took advantage of defense counsel's lack of information[6] and presented to the jury a version of the facts the prosecutor knew was irreconcilable with the physical and medical evidence. The prosecutor presented Devalle Miller's testimony that Petitioner "squatted over [the victim] stabbing him," with no testimony that Petitioner removed the black coat. The prosecutor thus created the misleading impression, contrary to his own understanding, that Petitioner could have stabbed the victim while wearing the long black coat. The prosecutor also elicited testimony from Miller that would resolve the apparent inconsistency between this version of events and the lack of blood on the coat, had defense counsel realized the conflict. Miller testified that, after Petitioner stabbed the victim, "[h]e backed up off the victim, a couple of feet, and just stood, you know . . . ." T.T. 1472. Then, Miller testified, the victim started going into convulsions. Miller testified that the victim was lying face down and when the convulsions started, the "blood started spewing from his nose and out of his mouth." T.T. 1472-73. That version of events seemed to place the stabber far enough away from the victim to avoid being covered with blood, but, as the prosecutor knew, it was inconsistent with the medical evidence. In closing, the prosecutor assured the jury that "Devalle Miller told you the truth," T.T. 1944.

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[6] Even though the prosecutor withheld crucial police reports and other documents, competent defense counsel might have learned enough about the facts to challenge the prosecutor's version of events. The prosecutor realized that defense counsel knew little about the facts, see H.T. 1040-41, and exploited that lack of preparation. The prosecutor's conduct was no less improper because competent counsel might have minimized the damage. In fact, in the view of Amici, the prosecutor's exploitation of defense counsel's inadequacies in order to win at any cost was a gross deviation from his obligation to seek justice.

Thus, the prosecutor successfully hid from both the defense and the jury evidence tending to prove that Petitioner was not the stabber. Even though prior counsel had the lab report, the prosecutor's failure to produce it to defendant's trial counsel, when another lab report was produced as potentially "material to the preparation of the defense," H. Ex. 62, "had the effect of representing to the defense that the evidence [did] not exist." Bagley v. United States, 473 U.S. 667, 682-83 (1985) (an incomplete response to a specific discovery request may cause more harm than a complete non-disclosure).

As a result, defense counsel never appreciated the significance of the evidence that Petitioner wore the coat throughout the incident. Even if defense counsel had seen the lab report regarding the coat, the prosecutor's failure to produce the evidence of where and when the blood splattered masked the significance of that report. Neither the defense nor the jury heard the evidence demonstrating that whoever stabbed the victim must have been covered with blood, or the recollection of Shonta Norman that Petitioner was wearing the coat when she observed him during the incident.

The prosecutor's conduct was improper. The prosecutor engaged in a "deliberate deception of the court and jury" in violation of the most fundamental standards of due process. Mooney v. Holohan, 294 U.S. 103, 112 (1935). He knowingly withheld exculpatory information, Brady v. Maryland, 373 U.S. 83 (1963), and knowingly misrepresented the physical evidence in the case. Miller v. Pate, 386 U.S. 1, 7 (1967).

The prosecutor's conduct in this case bears a disturbing resemblance to more recent conduct by this same prosecutor which required reversal of a different first degree murder conviction. In Garrett v. State, 2001 WL 280145 (Tenn. Cr. App. March 22, 2001), this same prosecutor argued

to a jury that the defendant locked the victim in the room of a house and then burned the house down. The Tennessee appellate court reversed the defendant's murder conviction, because the prosecutor suppressed a report in which the Fire Detective said the door to the room was, in fact, unlocked. This misconduct resulted in a public censure of this prosecutor by the Tennessee disciplinary board, In re Zimmermann, No. 24039-5-CH (Tenn. S. Ct. Disciplinary Bd. of Prof. Resp. May 28, 2002), which was the second public censure this prosecutor has received.[7]

In the view of Amici, the misconduct in this case likely affected the jury's decision to impose a death sentence.

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[7] For the prosecutor's history of similar misconduct, see the lower court opinions in this case, State v. Jones, 789 S.W.2d at 552 (Zimmermann's actions in promising not to pass prejudicial indictments to the jury then doing so "bordered on deception"); Abdur'Rahman v. Bell, 999 F. Supp. at 1089-90 (Zimmermann improperly withheld exculpatory evidence from, and misrepresented facts to, the defense); and in other cases, see, e.g., In re Zimmermann, 1986 WL 8586 (Tenn. Cr. App. 1986) (Zimmermann's violation of disclosure rules constituted "abuse of . . . proceedings of the court"); Zimmermann v. Board of Prof. Resp., 764 S.W.2d 757 (Tenn. 1989) (Zimmermann reprimanded for improper comments to the press); In re Zimmermann, No. 12128-5-LC (Tenn. S. Ct. Disciplinary Bd. of Prof. Resp. Sept. 30, 1994) (Zimmermann publicly censured for public statements questioning a trial judge's candor); State v. Middlebrooks, 995 S.W.2d 550, 558-59 (Tenn. 1999) (Zimmermann's representations to the jury in a capital case displayed "either blatant disregard for . . . or a level of astonishing ignorance of . . . the law"); State v. Vukelich, 2001 Tenn. Cr. App. LEXIS 734 (2001) (Zimmermann "strongly admonished" for soliciting the same "patently improper" testimony that had prompted a prior reversal).

As the prosecutor knew, the jury likely would not have imposed the death sentence if it had doubts whether Petitioner was the stabber. Absent the prosecutor's successful efforts to distort the evidence, the jury would have had doubts whether Petitioner carried out the murder.

II. The Prosecutor Withheld and Misrepresented Evidence to Distort the Nature of Petitioner's 1972 Homicide Conviction.

The state alleged Petitioner's 1972 conviction for second degree murder while in a federal prison as an aggravating circumstance supporting the death penalty. H. Ex. 59. The prosecutor anticipated, and expressed concern in his memorandum to his supervisor, that the defense would attempt to diminish the significance of the prior conviction by explaining that the murder occurred when Petitioner was trying to prevent a homosexual rape. H. Ex. 42 at 679. The prosecutor obtained a transcript of the earlier trial, but did not produce the transcript to the defense. Instead, he brought an FBI agent who had been involved in the earlier case to attend this trial and listed him as a witness. With the agent present, the prosecutor related to defense counsel that the 1972 homicide had resulted from "a turf war in the prison between the two gangs as to who would control the drug trade in the prison." H. Ex. 136 at 25. That threat dissuaded defense counsel from presenting the defendant's explanation of the circumstances of the prior homicide, circumstances the district court found could have mitigated the impact of this prior homicide on the jury's decision whether to impose death. 999 F. Supp. 1073, 1095 n. 27.

At the state habeas proceeding, the prosecutor admitted that his purpose was to prevent the defense from "getting into this 1972 murder," H. Ex. 136, ex. 9, and claimed that he had related to defense counsel what he had been told by the FBI agent who investigated it. The FBI

agent testified in a deposition, however, that the killing occurred in response to a dispute between Petitioner and the decedent concerning rumors of homosexual conduct between them. According to the agent, after Petitioner confronted the decedent, Petitioner lost control and stabbed him. H. Ex. 136 at 18-19. The killing was not about a drug turf war, as the prosecutor told defense counsel.[8]

The federal district court found that defense counsel was ineffective in not investigating Petitioner's prior convictions. 999 F. Supp. at 1099. The district court also found that the prosecutor had misrepresented to defense counsel the circumstances of the 1972 conviction, 999 F. Supp. at 1089, but believed that the prosecutorial misconduct claim was not properly before it. Thus, no federal court has ruled on the prosecutor's conduct in purposefully misstating the record of the 1972 trial in order to dissuade Petitioner from explaining to the jury the circumstances of this prior homicide in a light that might have affected the jury's determination whether to impose the death sentence.

The prosecutor's misconduct was egregious. If, as it appears, he made a representation to defense counsel he knew to be false in order to cut off an avenue of defense, that falsehood violates all standards of professional conduct. See National District Attorney's Association (NDAA), National Prosecution Standards 6.5 (2d ed. 1991) ("Counsel should proceed with candor, good faith and courtesy in all relations with opposing counsel"); Tennessee Supreme Court Rule 8,

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[8] Because the prosecution theory was that this killing was motivated by drug turf, the threat that an FBI agent would testify about an earlier killing with the same motivation would have been devastating. See T.T. 1941, 1979 (closing argument linking evidence that the defendant was trying to "take over" drug turf to prior murder); see also id. at 1981, 1984, 1985 (rebuttal argument).

Code of Professional Responsibility, DR 7-102(A)(5) (a lawyer shall not knowingly make a false statement of law or fact). It also violates the prosecutor's fundamental duty "to see that, so far as possible, truth emerges." Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in the judgment). See Wood v. Bartholomew, 516 U.S. 1, 9 (1995) (per curiam) (confirming that, if the prosecution's denial that polygraph examinations of the two witnesses existed were an intentional misstatement, the Court "would not hesitate to condemn the misrepresentation in the strongest terms").

In the experience of Amici, the existence of a prior homicide, particularly one in prison, is a significant factor in the jury's determination whether life imprisonment is sufficient to guarantee the safety of the community. A killing over gangs and drugs presents a very different picture of the cold-bloodedness and dangerousness of a defendant than does an outburst stemming from a series of homosexual assaults on the defendant while he was incarcerated and unable to escape from them. In the view of Amici, the prosecutorial misconduct that has been described in this case was sufficient to have swayed the jury's determination whether to impose a sentence of death.

III. The Prosecutor Withheld and Misrepresented Evidence Regarding Petitioner's Mental Health.

The prosecutor's false representation to defense counsel of the facts of the 1972 homicide was part of an even larger distortion. The prosecutor systematically suppressed and misrepresented the evidence of Petitioner's mental illness and the connection between that mental illness and Petitioner's past and present crimes.

Petitioner has an extensive, well-documented history of mental illness, none of which was presented to the jury. As

the district court recognized, Petitioner was diagnosed in 1964 as having a "paranoid personality." 999 F. Supp. at 1098. In 1972, a psychiatrist testified that Petitioner suffered from a Borderline Psychosis that caused him to lose control under stress. 999 F. Supp. at 1100. Petitioner repeatedly had exhibited psychotic symptoms, including banging his head against a wall when he was under stress. H.T. 123-124.

The district court correctly found that defense counsel fell short of their duties in not investigating Petitioner's mental history and presenting it to the jury. 999 F. Supp. at 1096-98. But the prosecutor's affirmative steps to conceal that history are distinct from, and not excused by, defense counsel's failings.

When Petitioner was brought to the police station following his arrest in this case, he began to cry and bang his head against the wall. H. Ex. 7. Reports from the Davidson County Sheriff's Department stated that Petitioner was banging his head against the floor, requiring that he be placed in a padded cell on "suicide" watch. H. Ex. 8. The prosecutor never disclosed the police reports describing that behavior. When the police report describing petitioner's arrest was turned over at trial as Jencks material, the facts relating to petitioner's extreme emotional distress had been redacted. Id.

The prosecutor expected that Petitioner's mental illness likely would be an issue at trial and sentencing and knew that Petitioner had raised his mental illness in defense of his earlier convictions. H. Ex. 15 (letter to Lewis Trammell, Petitioner's federal parole officer); H. Ex. 72 (defense counsel notice of intent to rely on mental status defense). He obtained the transcript of the 1972 homicide trial and sought information from the prosecutor in the 1972 trial and from Petitioner's federal parole officer. From those sources, the prosecutor learned that, in addition to claiming that he was

defending himself against a homosexual assault, Petitioner had raised an insanity defense in the 1972 trial. A psychiatrist testified at the 1972 trial that Petitioner was insane at the time of the offense due to a mental disease ("borderline" psychosis) that caused him to lose control under stress. H. Ex. 131 at 43-46. The jury in that case rejected the first-degree murder charge and convicted him of second degree murder, and Judge Merighe sentenced Petitioner to a psychiatric facility.

Upon motion of defense counsel in this case, Petitioner was sent to the Middle Tennessee Mental Health Institute ("MTMHI") for evaluation and a report to the court. H. Ex. 22. MTMHI sought information from the prosecutor concerning Petitioner's mental history. The prosecutor replied with information he knew to be false and calculated to affect the MTMHI report, to discourage investigation into Petitioner's mental history and, instead, to paint Petitioner as a cold-blooded killer. H. Ex. 34.

The prosecutor reported to MTMHI that, in the 1972 proceedings, Petitioner "moved the Court for a competency hearing and psychiatric evaluation as to his sanity. . . . the Court ruled that the defendant was competent and . . . there appears to be no evidence from the records submitted to us in that proceeding that the defendant relied upon an insanity defense at trial." H. Ex. 34 at 3 (emphasis added); see H. Ex. 36 (MTMHI report omitting mention of 1972 insanity defense). That representation stands in stark contrast to the prosecutor's earlier report to his supervisors concerning the 1972 trial. There, the prosecutor reported that he had "received a copy of the transcript of the defendant's first trial where he plead not guilty by reason of insanity." H. Ex. 42 at 679.

In addition to his misrepresentation concerning Petitioner's assertion of an insanity defense, the prosecutor

falsely informed MTMHI that the 1972 offense was a "cold blooded premeditated murder" by Petitioner, the leader of a "prison gang attempting to gain control over the victim's gang." H. Ex. 34 at 201. The prosecutor knew that his statement was false, that the 1972 incident involved a homosexual advance or threats, that there was no evidence that gangs or drugs were involved, and that the jury had rejected a first degree premeditated murder charge and convicted Petitioner of a lesser offense.

The prosecutor also withheld information that was clearly relevant to MTMHI's assessment of Petitioner. The prosecutor did not inform MTMHI of Petitioner's behavior after his arrest or the fact that, upon his arrest, two days after the offense, he was placed in a padded cell on suicide watch, where he remained for two days. H. Ex. 7. Nor did the prosecutor provide MTMHI with any records of the insanity defense raised in the 1972 trial or of the 1970 assault, which included a government motion for a psychological evaluation prompted in part by Petitioner's head-banging and suicide attempts. H. Ex. 131.

Misled by the prosecutor's representations, the MTMHI evaluators reported to the court that they found no issues regarding competency and no basis for an insanity defense. The report did not mention the 1972 insanity defense. The prosecutor then moved, *in limine*, to preclude the defense from asserting any mental state defense. The prosecutor cited the MTMHI report "clearly show[ing] that the results of the defendant's evaluation reflect no diagnosis of any mental disease, defect, emotional disturbance or even a personality disorder." H. Ex. 73.[2]

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[2] The prosecutor's Motion also stated that "the co-defendant...has no evidence" that Petitioner was suffering from a mental disease. H.Ex. 73. Miller had given the prosecutor a statement in which he said that Petitioner "went

The prosecutor's conduct was improper. He suppressed exculpatory evidence in violation of Brady v. Maryland and gave false information to the MTMHI, an agency directed by the court to report on Petitioner's mental condition. See American Bar Association, Standards for Criminal Justice: Prosecution Function 3-2.8 (a) (Commentary) (3d ed. 1993) ("It is fundamental that in relations with the court, the prosecutor must be scrupulously candid and truthful in his or her representations in respect to any matter before the court . . . it is essential if the prosecutor is to be effective as the representative of the public in the administration of criminal justice").

The prosecutor's conduct also had an effect on the course of the sentencing hearing. His suppression of evidence and false representations concerning Petitioner's mental history effectively discouraged any further examination into Petitioner's mental condition. Informed that an evaluation in the federal system in 1972 revealed no basis for concerns about competency or insanity, and provided with no current evidence of mental illness, MTMHI did little to further investigate Petitioner's mental illness. Everyone in the court system, including MTMHI, the trial judge and defense counsel, was lulled into the belief that there were no serious issues concerning Petitioner's mental condition.[10]

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from day to night" and was acting "crazy." Notes on Miller's statement indicated that it suggested "Insanity and [a] mitigating factor." H. Ex. 73, 51 (pp. 166-67, 171, 177).

[10] Of course, the district court is correct that defense counsel should have obtained Petitioner's records, because competent counsel in a case that may result in the death penalty always should be fully informed about the defendant's background. The fact that competent counsel might have been able to limit the damage caused by the prosecutor's suppression of evidence and affirmative misrepresentations does not change

Dr. Craddock, the MTMHI psychologist who evaluated Petitioner, testified in the habeas proceeding that, when he conducted his evaluation, he had no information from Petitioner's 1972 murder trial that Petitioner might suffer from a Borderline Personality Disorder. H.T. 122. He had no information about the current offense other than what he received from the prosecutor. H.T. 151-52. After learning of Petitioner's history and his conduct after his arrest in this case, the psychologist did not take issue in the habeas proceeding with another expert's diagnosis that Petitioner suffered from Borderline Personality Disorder, and agreed that a person with Borderline Personality Disorder can slip into a psychotic state when under stress. H.T. 129-39, 140.

The consequence of these falsehoods was a sentencing hearing where the prosecutor exercised free rein to paint Petitioner as "a depraved man, not someone suffering from severe extreme emotional disturbance, a depraved man." T.T. 1981-82. The prosecutor could describe the evidence in its most inculpatory light, asserting that the killing was purely for Petitioner's "pleasure and enjoyment," id., without fear of contradiction by defense counsel or expert testimony. The jury had no context in which to evaluate Petitioner's conduct, in this offense as well as the former, as anything other than cold-blooded killings.

The prosecutor's successful withholding from the jury of all evidence of Petitioner's mental illness also deprived the jury of the context in which to evaluate Petitioner's bizarre testimony at the sentencing hearing, in which he testified that he could not remember what happened on the night of the killing and then incoherently "submit[ted] to the fact that [he was] the individual . . . that stabbed Mr. Daniel Patricks." T.T. at 1864; see H.T. 471-72, 488. Dr. Sadoff, the

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the fact that the prosecutor's egregious misconduct had a disastrous impact on the fairness of this sentencing hearing.

psychiatrist who examined Petitioner for the habeas hearing, testified that Petitioner's behavior on the stand at the sentencing hearing reflected his illness -- he fell apart under stress. H.T. at 485-497. Had the jury known of Petitioner's mental history, his testimony would have given it no confidence that Petitioner was describing what actually happened.

IV. The Prosecutor's Conduct Violated Basic Standards Governing the Legal Profession and Deprived Petitioner of Due Process of Law.

The Constitution and standards of professional ethics forbid prosecutors from winning convictions or death sentences by deception. Many years ago, in Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam), this Court held that the prosecution's knowing use of perjured testimony violated the constitutional guarantee of due process of law. "Such a contrivance by the state to procure the conviction and imprisonment of the defendant is as inconsistent with the rudimentary demands of justice as is obtaining the like result by intimidation." Id. As the Court explained in Brady v. Maryland, extending Mooney to the suppression of evidence favorable to the accused:

> The principle of Mooney v. Holohan is not punishment of society for the misdeeds of the prosecutor, but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. 373 U.S. 83, 87-88 (1963).

The same principle likewise forbids prosecutors from misrepresenting evidence, Miller v. Pate, 386 U.S. 1 (1967) (knowing misrepresentation of physical evidence violated

Due Process Clause). Prosecutorial integrity is vital to ensure that juries have the fullest opportunity to find the facts so that criminal trials remain the "main event" in the criminal process. Within our system of justice, "[t]he State's obligation is not to convict, but to see that, so far as possible, the truth emerges." Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in the judgment).

The standards of the legal profession also recognize the special responsibilities of public prosecutors to seek justice. Tennessee Supreme Court, Rule 8, Code of Professional Responsibility, EC-7-13 ("the public prosecutor's duty is to seek justice, not merely to convict"); State v. Spurlock, 874 S.W. 2d 602 (Tenn.Crim. App. 1993); American Bar Association, Standards for Criminal Justice: The Prosecution Function, 3-12(c) (3d ed. 1993) (same); National District Attorney's Association, National Prosecution Standards, 1.1 (2d ed. 1991) ("the primary responsibility of prosecution is to see that justice is accomplished").

The pursuit of justice is incompatible with deception. Prosecutors may not conceal facts or knowingly fail to disclose what the law requires them to reveal. Tennessee Code of Professional Responsibility, DR 7-102(A). Prosecutors should be candid with opposing counsel, National Prosecution Standards, 6.5.a, and may not "impede opposing counsel's investigation of the case." Id. 53.5.a. Nor may a prosecutor (or any lawyer) legitimately deceive third parties. Proposed Tennessee Rule of Professional Conduct 4.1(a) (Dec.1, 2001) & Comment [1]; American Bar Association, Model Code of Professional Responsibility DR 7-102(A)(5) (lawyer shall not make false statement of law or fact). Nowhere in our legal system is strict adherence to these principles more vital than in cases in which the State seeks the death penalty.

Prosecutorial misconduct such as that in this case requires reversal if there is "any reasonable likelihood [that the misconduct could] have affected the judgment of the jury." Giglio v. United States, 405 U.S. 150, 154 (1971). See also Kyles v. Whitley, 514 U.S. 419, 433 (1995). The record of this case shows that the prosecutor engaged in a pattern of deception that deprived Petitioner, and ultimately the jury, of information that would have fundamentally altered the calculus in the sentencing phase of Petitioner's trial.[11]

Together, Amici have many years of experience as prosecutors and have tried or supervised countless criminal cases, including those in which the death penalty was sought. In the judgment of Amici, the consequences of the prosecutor's withholding and distorting of evidence in this case were significant enough to have affected the judgment of the jury. Combined, the impact of the prosecutor's distortions fundamentally changed the character of the trial. Kyles, 514 U.S. 419. It would be a serious miscarriage of justice for Petitioner to be executed without any federal review of the prosecutor's conduct and its impact on the fairness of Petitioner's trial and sentencing.

CONCLUSION

For the foregoing reasons, Amici Curiae urge this Court to reverse the judgment of the United States Court of Appeals for the Sixth Circuit and remand the case for further proceedings.

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[11] This brief has discussed the prosecutor's misconduct in three aspects of the case: the issue of who was the stabber; the aggravating circumstance of the prior homicide; and Petitioner's mental condition. Other claims of prosecutorial misconduct in the habeas petition further demonstrate a pattern of misconduct and deception.

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